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The Charter of Rights and Public Policy in Canada

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The Charter of Rights and Public Policy in Canada

Abstract

Much of the literature on the Charter has focused on the manner in which the courts have interpreted the document. This essay examines the Charter from another perspective-its impact on the policy process within government. Drawing on a series of papers prepared by senior government officials at both the federal and provincial levels, the authors argue that the Charter has permanently changed the way in which governments formulate and implement public policy in Canada. Virtually all policy proposals making their way to the Cabinet table must be examined to ensure that they conform to the requirements of the Charter. This has forced governments to put in place new procedures and structures to undertake this review. It has also changed the balance of power within government, significantly enhancing the role and authority of the Attorney General. The authors describe these important structural changes and assess the degree to which they make a difference to policy outcomes.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Public policy (Law); Canada

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THE CHARTER OF RIGHTS AND PUBLIC POLICY IN CANADA[©]

BY PATRICK J. MONAHAN* AND MARIE FINKELSTEIN**

Much of the literature on the *Charter* has focused on the manner in which the courts have interpreted the document. This essay examines the *Charter* from another perspective—its impact on the policy process within government. Drawing on a series of papers prepared by senior government officials at both the federal and provincial levels, the authors argue that the *Charter* has permanently changed the way in which governments formulate and implement public policy in Canada. Virtually all policy proposals making their way to the Cabinet table must be examined to ensure that they conform to the requirements of the *Charter*. This has forced governments to put in place new procedures and structures to undertake this review. It has also changed the balance of power within government, significantly enhancing the role and authority of the Attorney General. The authors describe these important structural changes and assess the degree to which they make a difference to policy outcomes.

In 1982 we put an end to most legal positivism. Now that's a revolution. That's like introducing the metric system. It is like Pasteur's discoveries ... [I]like the invention of penicillin, the laser. It was a great event.

— Chief Justice Lamer¹

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¹ In an interview with J. Sallot, "How the Charter Changes Justice" *The [Toronto] Globe and Mail* (17 April 1992) A11.

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I. INTRODUCTION

With Canada's *Charter*² now a decade old, few will dispute the fact that its enactment represents a fundamental watershed in Canadian politics. Most commentators argue that the *Charter* has "truly transformed the Canadian political landscape,"³ revolutionizing our views on the nature of law and political debate. Whereas the pre-1982 Constitution focused on relations between governments, the *Charter* has created what Alan Cairns has termed a "citizen's constitution," one

² *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³ R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992) at 1.

which focuses on group identities that transcend or are indifferent to provincial boundaries.⁴

Yet, while there is broad agreement on the *Charter's* significance,⁵ there is little consensus on the precise nature of its impact.⁶ Moreover, there has been relatively little sustained attempt to measure the impact of the *Charter* on the public policy process in general. The analysis undertaken has tended to focus on the impact of particular court decisions,⁷ or on the *Charter's* role in shaping particular political controversies.⁸ We know relatively little about the way in which the *Charter* has affected how governments go about their business on a day-to-day basis. This is partly due to the secrecy surrounding the policy-making process in Canada. Canadians tend to know less about the inner workings of their own government than do citizens in the United States or the United Kingdom.⁹ Given the paucity of our knowledge about Cabinet government in Canada, it is hardly surprising that we know relatively little about the *Charter's* role in the process.

This study attempts to trace the way in which the *Charter* has affected the workings of government in Canada over the past decade.

⁴ A.C. Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, ed. by D.E. Williams (Toronto: McClelland and Stewart, 1991) at 109.

⁵ It should be noted that individual Canadians are uncertain of the degree to which the *Charter* has had any impact on their lives. Recent polling data indicates that, while 45 per cent of Canadians believe that the *Charter* has "been a good thing for individual Canadians," 35 per cent believe that the *Charter* hasn't made much of a difference, and a further 6 per cent are unsure of whether the *Charter* has had an impact. The Angus Reid Group, Public Release, "A Decade with the Canadian Charter of Rights and Freedoms" (National Angus Reid/Southam News Poll) (11 April 1992) at Table 1.

⁶ See, for example, the differing views on the impact and benefits of the *Charter* in M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1989); and D. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990).

⁷ See F.L. Morton, P.H. Russell & M.J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1.

⁸ See Cairns, *supra* note 4 (analyzing the role of the *Charter* in the debate over the Meech Lake debate).

⁹ See D. Smith, "The Federal Cabinet in Canadian Politics" in M.S. Whittington & G. Williams, eds., *Canadian Politics in the 1990s*, 3d ed. (Scarborough, Ont.: Nelson Canada, 1990) 359 at 359, who notes that "studies of the Federal Cabinet are rare. There is no encyclopedic Canadian work comparable to Sir Ivor Jennings's *Cabinet Government* in Great Britain, nor are there even many less, ambitious exercises."

Our analysis and conclusions are based on a series of papers prepared by senior officials in governments across Canada. The authors of these papers were asked to describe any new procedures or policy processes that have been put in place in response to the *Charter's*¹⁰ enactment. The papers also deal with a wide variety of other issues, including how *Charter* considerations are applied in the policy process, how litigation strategy is developed in the face of a court challenge to legislation, and the *Charter's* impact on law enforcement. The papers were presented and debated at a two day Round-table Conference, attended by government officials, politicians, private sector lawyers, academics and journalists, convened by the Centre for Public Law and Public Policy in November 1991.

The most important finding emerging from this study is that the *Charter* has permanently changed the way in which policy proposals make their way to the Cabinet table. Many governments have instituted new procedures or bureaucratic structures designed explicitly to ensure that the *Charter* is taken into account at the earliest stages of the policy process. Even the smaller provincial governments, which have tended to respond to the *Charter* in a less formalized manner, nevertheless believe that the *Charter's* existence has changed the way policies are evaluated and approved.

The senior government officials participating in this study unanimously held that the *Charter* has affected more than just the bureaucratic process. In their view, policy outcomes have been significantly affected by the *Charter's* existence. While the *Charter* might initially have been greeted with some resistance or scepticism in government circles, the senior officials participating in this study believe that "*Charter* values" have now been deeply and permanently integrated into the attitudes of government decision makers across the country.

This embrace of the *Charter* by government decision makers appears to be, at least for some officials or departments, more a matter of necessity than desire. The participants in our study reported that, at least initially, the introduction of the *Charter* was not accompanied by any fundamental changes in the way in which governments formulated policy. But as the courts, particularly the Supreme Court of Canada,

¹⁰ See Appendix A, which sets out the guidelines for the preparation of the papers.

evinced an intention to apply a "large and liberal"¹¹ interpretation of the *Charter*, governments were forced to respond. Certain court decisions striking down legislation on the basis of the *Charter* were described as "bombshells" within government circles.¹² Officials were forced to scramble and assess the policy damage in the particular case and to put in place new structures and procedures to ensure that similar difficulties were avoided in the future.

For policy makers, the *Charter* represents a new element of uncertainty in the policy mix. Whereas prior to 1982, the risk of constitutional reversal in the courts was relatively limited, the enactment of the *Charter* has very substantially increased those risks. In general, governments dislike uncertainty and, where reasonably possible, will seek to minimize or reduce its impact on their calculations. But there are two factors which make the uncertainty associated with the *Charter* particularly difficult to manage. First, given the absence of authoritative court rulings on many important *Charter* issues, it is extremely difficult to make an accurate assessment of the risks of reversal by a court. Second, a negative court decision may require expenditure of very substantial amounts of money. Cases such as *Singh v. Canada (Minister of Employment and Immigration)*,¹³ *R. v. Askov*,¹⁴ and *R. v. Schachter*¹⁵ have required additional government outlays of hundreds of millions of dollars. Moreover, these additional outlays were contingencies which were not factored into budgetary calculations made prior to the Court decisions. In this period of restraint and retrenchment, which governments across North America face, this type of after-the-fact fiscal monkey-wrench is particularly difficult to accommodate.

The government has responded by attempting to reduce the uncertainty associated with the *Charter* on an *ex ante* basis. A number of governments now automatically require all policy proposals coming to Cabinet to be subjected to *Charter* scrutiny at the earliest stages of the

¹¹ M. Dawson, Associate Deputy Minister, Public Law, Department of Justice, Canada, "Impact of the Charter on Public Policy and the Department of Justice" (Paper presented at the Round-table Conference, York University, November 1991) also in this volume at 595.

¹² *Ibid.*

¹³ [1985] 1 S.C.R. 177.

¹⁴ [1990] 2 S.C.R. 1199 [hereinafter *Askov*].

¹⁵ [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

policy process.¹⁶ Under these *early-warning* systems, *Charter* considerations are supposedly factored into the analysis at the front end of the process, rather than as a last minute add-on when a fully-developed policy proposal is about to reach the Cabinet table. This type of scrutiny reduces, to the greatest extent possible, the likelihood that the courts will intervene to redesign policy schemes in the absence of an adequate understanding of the costs and implications of the available alternatives.

In this study we argue that these new processes and new ways of making policy make a difference to policy outcomes. But identifying the precise nature of that difference—of how policy outcomes are altered in light of the *Charter*—is by no means a simple or a straightforward exercise. The participants in this study emphasized the fact that the *Charter's* influence on policy outcomes is a matter of degree. Instances of the *Charter* totally blocking governments from proceeding with legislation or policy initiatives appear to be relatively rare. Instead, the *Charter* exerts a kind of gravitational pull within the policy system, altering the relative balance between the various options being considered by government. According to participants in our study, the *Charter* forces governments to redesign or to fine tune law or policy so as to respond to *Charter* concerns.

It is very difficult to offer any universal, all-encompassing conclusions or to pinpoint or categorize in absolute terms the *Charter's* impact since it is a matter of degree. The papers prepared for this study further suggest that the significance of the *Charter* will vary depending upon the particular policy field that is under consideration.

Despite these caveats, we do believe that it is possible to say something meaningful about how the *Charter* has affected policy making and the administration of law. This paper sets out the above conclusions, pointing out the extent to which the policy process and the policy outcomes it generates are different as a result of the *Charter*.

The first section of the paper provides an overview of the ways in which senior government officials believe the *Charter* has changed how they make policy or enforce laws. First, we describe a series of new procedures or structures which have been created within the governments of Canada, Ontario, Saskatchewan and British Columbia. These new processes are described in some detail since many of them

¹⁶ The precise nature and extent of this review is described in detail below in Part II.

are of relatively recent origin and have not, to our knowledge, been discussed in the existing literature on the *Charter*. After describing these institutional changes, we set out the perceptions of government officials within each government as to how substantive policy outcomes are different because of the *Charter*. Finally, we consider how these governments respond to *Charter* challenges in the courts and the extent to which litigation policy has been affected by the *Charter*.

The next section of the paper considers the views of a wide range of observers from outside government on the *Charter's* impact on the policy-making process. As part of this study, we included participation by representatives of interest groups, academics, and the private bar. We report their views of the ways in which governments have changed (or, in some cases, refused to change) their behaviour and policies in light of the *Charter*.

Finally, we offer a series of four conclusions regarding the overall impact of the *Charter* on the public policy process. We observe first that different governments have responded in different ways to the *Charter's* existence. While some governments have put in place quite elaborate and formalized systems for *Charter* scrutiny, others have continued to rely on informal and *ad hoc* approaches. By putting in place formal and regular structures for *Charter* screening, governments ensure that all relevant *Charter* issues are at least identified and considered. This further ensures the most complete and careful analysis of the implications of the *Charter* for particular policy initiatives.

Second, we suggest that the *Charter* has not substituted judges for politicians as some critics of the *Charter* had feared would happen. Our findings indicate that the *Charter* rarely forecloses a government policy or initiative. Rather, what the *Charter* does is alter the environment in which political decisions are made. It has introduced an important new variable into the political mix but has left a significant element of discretion in the hands of political leaders. Key political decisions are still being made by politicians rather than judges. Focusing on two recent government initiatives, the amendments to the *Criminal*

*Code*¹⁷ dealing with sexual assault¹⁸ and the referendum legislation,¹⁹ we point out how *Charter* considerations interact with other political variables.

Third, the *Charter* has altered the balance of power within government itself, increasing the role and status of Attorneys General and their legal advisers. In many governments, the Attorney General has been constituted as a new central agency with a range of power and influence rivalling only that of the Finance Department. A very large part of this power is attributable to the monopoly which the Attorney General enjoys over the provision of legal advice within government. Its heightened influence is an important institutional change which has thus far gone almost unnoticed in the literature on government and public policy in Canada.

Finally, we suggest that the *Charter* has had an important impact on the nature of political debate and argument, and that these broader political changes have themselves impacted on government policy making. The *Charter* has introduced a new kind of valuable political good or commodity into the political arena. This new political commodity is the ability to make a credible claim that some right, privilege or other entitlement is protected by the *Charter*. The ability to advance these types of claims is linked to courts and the litigation process. But claims about the *Charter* are also advanced in political forums, with the object of securing changes in government policy favourable to one's own interest. The ability to invoke the *Charter* in aid of one's interests is an extremely powerful political tool. As such, various groups and organizations are prepared to devote significant energy and resources to the task of linking their interests with the *Charter*. In the first decade of the *Charter*, certain sorts of groups or organizations have had greater success than others in forging this link with "*Charter* values". We trace some of the broader implications of this new type of *Charter* politics for the future of public policy in Canada.

The early debates over the *Charter* focused on the legitimacy of handing over power from elected politicians to unelected judges. We

¹⁷ R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

¹⁸ Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3d Sess., 34th Parl., 1991 (1st reading 12 December 1991) [hereinafter *Bill C-49*].

¹⁹ Bill C-81, *The Referendum Act*, 3d Sess., 34th Parl., 1992 (1st reading 15 May 1992) [hereinafter *Bill C-81*].

suggest that the preoccupation with this *legitimacy* debate may have deflected attention from some of the more fundamental changes which have been brought about by the *Charter*. The papers prepared for this study suggest that the increased role of the judiciary under the *Charter* is of secondary importance. Far more significant is the way in which the *Charter* has changed political debate and the policy process itself. The *Charter* has not really reduced the role, responsibilities or power of our politicians or the executive. Rather, it has altered how that political power is exercised, providing new opportunities, incentives and advantages for certain sorts of interests. As we enter the second decade of the *Charter* era, identifying who has benefitted and who has lost from these changes is what requires sustained and careful attention.

II. THE CHARTER AND PUBLIC POLICY: THE VIEW FROM WITHIN GOVERNMENT

The senior government officials participating in this study were unanimously of the view that the *Charter* has had a major effect on policy making. The consensus was that *Charter* compliance has become one of the most important factors in the policy-development process, with some dissension only on the question of degree. Some participants went so far as to suggest that *Charter* considerations may now equal or even outweigh fiscal considerations.²⁰

New processes and, in some cases, whole new bureaucracies have been created in government to deal with *Charter* concerns. The particular changes which have been implemented by Canada, Ontario, Saskatchewan and British Columbia are described in some detail below. In general terms, it can be seen that the *Charter* has tended to have a centralizing effect within government. Initiatives in the line ministries and departments of many governments are coming under review by newly created *Charter* sections in their respective Justice/Attorney General Departments. The purpose of this *Charter* review is not only to identify and assess *Charter* problems, but also to maintain a coherent and coordinated *Charter* policy on a government-wide basis.

What follows is a summary of the responses from officials in the federal government, as well as in the provinces of Ontario, British

²⁰ *Supra* note 11.

Columbia and Saskatchewan respecting the *Charter's* impact on their day-to-day work. As will be evident, these officials report that they have embraced *Charter* values and have made an effort to ensure that their policies can withstand *Charter* scrutiny. Later in the paper we will subject these claims to a more critical analysis. This first section merely records the perceptions of government officials as to the *Charter's* impact on their activity.

A. Federal Government

1. Institutional change

Federal officials participating in this study stated that, from their perspective, the *Charter* has had an enormous impact on policy making. The Minister of Justice has a statutory obligation to examine all regulations and government bills for *Charter* consistency and to report any inconsistencies to the House of Commons.²¹ The Department of Justice has therefore created a series of new procedures for *Charter* review.

First, a Human Rights Section has been established within the Department of Justice as a centre for *Charter* expertise for Justice lawyers and their line ministry clients. The staff of this section has grown to twenty-two lawyers with responsibility for research, policy work, advisory services, and litigation support in matters relating to the *Charter* and other human rights instruments.²²

Second, within each department there are Justice lawyers responsible for providing legal advice, including advice on any potential *Charter* problems. The Deputy Minister of Justice has reportedly been urging client departments for some time to consult their legal advisers at an early stage to identify *Charter* and other legal issues before policy

²¹ *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4; and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 3, as amended by the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, R.S.C. 1985 (1st Supp.), c. 31, ss. 93-94.

²² *Supra* note 11.

options are fixed.²³ In the words of one Justice lawyer, the *Schachter*²⁴ case was a “bombshell” in Ottawa and provided a powerful lesson on the necessity of teamwork among policy makers and lawyers in the policy development process.²⁵

Justice lawyers on staff in the client departments are directly involved in identifying *Charter* issues during the policy development process. They now have, and consult, materials prepared by the Human Rights Section. Human Rights Section lawyers are also called in to provide assistance and to advise on alternative policy solutions. Additional problems may ultimately be spotted by the Legislation Section of the Justice Department and sent back either to the legal services unit in the originating ministry or to the Human Rights Section in Justice.²⁶

Third, in 1991, the Clerk of the Privy Council, Paul Tellier, wrote to all deputy ministers outlining steps to ensure that *Charter* issues are identified and assessed before new policy proposals are submitted to Cabinet. Mr. Tellier specifically asked the deputy ministers to consult their legal advisers early in the process so that a *Charter* analysis, assessing the risk of successful court challenge, the impact of an adverse decision, and the possible costs of litigation, could be included in the material going to Cabinet.²⁷

Two aspects of these new procedures bear emphasis. First, it is significant that concern over *Charter* compliance is no longer simply a matter being raised by the Department of Justice. Mr. Tellier’s intervention indicates the seriousness and the visibility of *Charter* concerns within the highest reaches of the federal bureaucracy. Secondly, the current emphasis within the federal government is on

²³ *Ibid.*

²⁴ *Supra* note 15. At trial it was held that the appropriate remedy was not to strike down the provision, which provided benefits to adoptive parents under the *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48, as being contrary to section 15(1), the “equality” provision, of the *Charter* but to extend it to natural parents: [1988] 3 F.C. 515 (T.D.).

²⁵ *Supra* note 11.

²⁶ *Ibid.*

²⁷ *Ibid.* See also, M. Zazulak, General Counsel, Correctional Services Canada, “Charter of Rights and Freedoms: A Correctional Service of Canada Perspective” (Paper prepared for the Round-table Conference, York University, November 1991) at 4-7 [unpublished]. See p. 499, note 1.

identifying *Charter* concerns at the earliest stages of the policy development process. It is evident that waiting to raise *Charter* concerns until a full-blown policy proposal reaches the Cabinet table makes it much more difficult to accommodate those concerns.

Justice lawyers at the Conference felt that the most serious *Charter* issues are resolved, at least in the sense of being considered and having a position taken on, before they reach Cabinet. If there is still a dispute outstanding, the Minister of Justice may be invited to express his or her views to the appropriate Cabinet committee.²⁸

2. Substantive policy making

To what extent does this effort to take into account *Charter* concerns lead to changes in policy or in law enforcement practices within the federal government? Within the Department of Justice, the view is that the *Charter* has had a very significant impact on both policy formulation and the administration of law.

Federal Justice lawyers see the Department of Justice as a central agency.²⁹ Whereas formerly their advice was sought on an *ad hoc* and issue-specific basis, today the *Charter* has meant that they are involved on a continuous and regular basis in the work of all departments. The range and degree of their influence may not yet rival the Department of Finance, but they are involved in the mainstream of decision making to a previously unheard of degree.³⁰ Justice lawyers do not see their role as involving the exercise of a *veto* over proposals or projects of other departments. Rather, they see themselves as working cooperatively with other ministries to overcome *Charter* roadblocks and to devise viable alternatives. Once a scheme has been implemented and struck down, it is difficult at that stage to develop workable programs which will pass constitutional muster.³¹

²⁸ *Supra* note 11.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ The trial decision in *Schachter*, *supra* note 24, was affirmed at the Federal Court of Appeal: [1990] 2 F.C. 129. This put budgetary *Charter* pressure on the government when trying to develop new policy options in this area. The *Schachter* decision in turn has caused the Federal government to review the *Income Tax Act*, R.S.C. 1952, c. 148, for *Charter* conformity in order to avoid litigation

Justice lawyers argue that they take a broad reading of court rulings on the *Charter*. They believe that government is under an obligation to try to live up to the spirit, and not just the letter, of the *Charter*. In some cases this produces conflict with line departments, which might adopt a somewhat narrower interpretation of a court ruling on a particular issue.

For example, there is uncertainty about how Supreme Court of Canada decisions like *R. v. Sparrow*,³² a case which deals with Aboriginal affairs, should be interpreted. Legal opinions from the Justice Department have advised a broad and liberal interpretation. Line ministries, like the Departments of Fisheries, Indian Affairs, and the Environment, which are directly affected in their routine functions, apparently feel that a narrower approach is appropriate until further clarification is received.³³

Federal enforcement agencies, such as Corrections and the RCMP, claim that they adopt an expansive approach to the *Charter*. According to Corrections Canada, *Charter* considerations are of fundamental importance to policy development. They indicate that they endeavour to identify potential *Charter* issues, sometimes even before seeking *Charter* advice. Corrections tries to minimize the risk of a successful court challenge by reading *Charter* decisions broadly³⁴ and considers itself as having incorporated *Charter* values and norms within its service philosophy.

and its resulting uncertainties. It also has resulted in changes to unemployment insurance provisions: *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, s. 20, as am. by S.C. 1990, c. 40, s. 14.

³² [1990] 1 S.C.R. 1075.

³³ M. Krasnick, Secretary, Ontario Native Affairs Secretariat, Address (Oral remarks at the Round-table Conference, York University, November 1991) [unpublished]. See p. 499, note 1.

³⁴ See Zazulak, *supra* note 27 at 5-6. One example of where the *Charter* has influenced Corrections policy is in the search and seizure regulations relating to inmates: see *Weatherall v. Canada (A.G.)*, [1989] 1 F.C. 18 (C.A.). In Bill C-36, *An Act Regarding Corrections and the Conditional Release and detention of offenders and to establish the office of Correctional Investigator*, 3d Sess., 34th Parl., 1991-1992 (assented to 14 May 1992); the Service has attempted, through the introduction of objective preconditions, to balance the security needed for inmate searches with the section 8 *Charter* prohibition against unreasonable searches and seizures. However, Corrections will, as a matter of litigation policy, initially defend policies in operation from *Charter* challenge.

When a significant provision is declared of no force and effect under the *Charter*, a range of responses will be considered, including a proposal to amend the offending provision to remedy the *Charter* deficiency or the issuing of a policy directive either as an interim response pending amendment or as a solution in itself. The latter option, however, carries a greater risk; section 1 of the *Charter* will not be available as a defence of such a limitation because it would not be "prescribed by law."

The RCMP reports that its law enforcement operations have been significantly affected by the *Charter*. In fact, the RCMP's senior legal adviser suggests that the force has been the "hardest hit" of any department or agency within the federal government by the enactment of the *Charter*.³⁵ After *Hunter v. Southam Inc.*,³⁶ for example, officers must be better prepared and have more information before attempting a search or seizure. It is anticipated that legal advice will increasingly be sought with respect to the limitations on a proposed operation in light of sections 8 (unreasonable search or seizure) and 10 (right to counsel) of the *Charter*. Indeed, Crown attorneys are becoming involved early on in complicated investigations in order to avoid *Charter* infringements. The *R. v. Wong*³⁷ case made clear that video surveillance is not permitted except in the clearest situations where there is no reasonable expectation of privacy, since there is no provision in the *Criminal Code* for a warrant in respect of video surveillance. Similarly, *R. v. Duarte*³⁸ has, for most practical purposes, effectively eliminated electronic surveillance in the absence of a judicial authorization.

The RCMP argues that it has adopted a "proactive" response to the *Charter* and has attempted to integrate *Charter* values into its operations in a systematic way.³⁹ It has undertaken initiatives in response to equality, multiculturalism and Aboriginal concerns which go beyond the strict requirements of court decisions.⁴⁰ The force has

³⁵ C.F. Beckton, Director of Legal Services, Royal Canadian Mounted Police, "Charter of Rights and Freedoms: An Agency Perspective" (Paper prepared for the Round-table Conference, York University, November 1991) [unpublished]. See page 499, note 1.

³⁶ [1984] 2 S.C.R. 145 [hereinafter *Southam*].

³⁷ [1990] 3 S.C.R. 36.

³⁸ [1990] 1 S.C.R. 30.

³⁹ Beckton, *supra* note 35.

⁴⁰ For example, since 1988, the RCMP's policy is not to discriminate in the hiring of homosexual officers: see Beckton, *supra* note 35. Beckton reports that, with respect to Aboriginal policing, the policy today has been changed from policing for, to policing in consort with, Aboriginal peoples. The force is seeking to hire more Native constables, using educational programs to attract them to the force, and to assist Aboriginals in establishing their own police forces. Similarly, the RCMP is actively recruiting visible minorities, francophones, and women in an effort to respond to the needs of the multicultural Canadian community. Special training has been instituted to assist RCMP officers to understand the special needs of these communities. According to Beckton, "cross-cultural" training is given to all recruits now at the training academy. A program has been established to assist Aboriginals to attain the necessary qualifications to become regular members of the force. The RCMP also plays an active role in the management of the Police Race Relations

conducted, and continues to conduct, reviews of its legislation and regulations, such as those pertaining to mandatory retirement,⁴¹ for *Charter* validity.

In summary, the federal government perceives the *Charter* as currently playing a very significant role in terms of policy development and law enforcement. The *Charter* does not operate to “veto” or block governments from undertaking policy initiatives or administering laws. Rather, it forces government to redesign its policies or programmes to respond to *Charter* concerns. Federal government lawyers argue that they adopt a broad, rather than a narrow, reading of the *Charter* to reduce the risks of a subsequent adverse court ruling. They believe their advice on *Charter* issues is heeded and, where a *Charter* issue is identified, steps are taken to ensure that those concerns are addressed.

3. Litigation policy

In addition to affecting policy development and law enforcement activities, the *Charter* has caused two important changes to be made in the way the federal government approaches constitutional litigation. *First*, Justice consults much more widely within government, going well beyond the client ministry involved in the particular litigation because frequently other departments are also interested in both the outcome and the position to be advanced. *Second*, Justice officials no longer automatically defend, using all available arguments, legislation which is attacked on *Charter* grounds. They scrutinize the legislation, the government’s position and recent developments in *Charter* jurisprudence to decide whether particular arguments should even be put forward or, in extreme cases, whether the legislation should be defended at all.⁴²

Justice has established two separate committees, the Litigation and *Charter* Committees, to review proposed legal arguments for consistency and conformity with general governmental policy.⁴³ The

Centre established at the Canadian Police College in Ottawa and has established an Advisory Committee on Visible Minorities.

⁴¹ *Ibid.* Beckton’s paper states that, prior to the proclamation of section 15 of the *Charter*, the RCMP changed its retirement policy from one which required different ranks to retire at different ages to one which instituted a uniform retirement age of sixty for all members.

⁴² Dawson, *supra* note 11. See Part II, *Saskatchewan Government*, below for discussion.

⁴³ Dawson, *supra* note 11.

existence of these committees ensures that there is a regular process of review, rather than reliance on an *ad hoc* system of advice and analysis. The goal is to ensure that the position the department takes in a particular case reflects a reasoned and defensible view of the government's *Charter* obligations.

4. Summary

There has obviously been a very significant impact on the formal policy structures within the federal government as a result of the *Charter*. New bureaucratic branches or committees have been established with an explicit mandate to ensure that all policy initiatives are reviewed for *Charter* concerns. Moreover, the perception of lawyers within the federal government is that they take a "large and liberal"⁴⁴ approach to *Charter* analysis, rather than a narrow or technical one. It is also significant that the Clerk of the Privy Council has issued instructions requiring all policy initiatives to be scrutinized for *Charter* problems. This further suggests that the federal government is attempting to reduce the risk of adverse court rulings under the *Charter* to the greatest extent possible.

B. Ontario Government

1. Institutional change

The pattern in Ontario is similar in many respects to that which has developed at the federal level. In the mid-1980s, the Ontario Government initiated a review of all existing legislation to introduce an omnibus bill that would bring Ontario statutes in conformity with the *Charter*.⁴⁵ But this exercise, while complicated, was also circumscribed; the process was undertaken on the understanding that amendments would not deal with matters over which there was any legitimate legal or policy dispute. This limitation was apparently agreed to because there

⁴⁴ *Ibid.*

⁴⁵ See The Honourable Ian Scott, "The Charter and Public Policy" (Paper prepared for the Round-table Conference, York University, November 1991) [unpublished]. See p. 499, note 1.

was resistance in certain ministries or agencies to the *Charter*-compliance exercise.⁴⁶ The exercise culminated in the enactment of the *Equality Rights Statute Law Amendment Act*⁴⁷ in 1986, which amended a wide variety of Ontario statutes to bring them into conformity with the *Charter*.

This *Charter*-compliance exercise was merely the first step in Ontario's response to the *Charter*. In 1986, the government determined that all policy submissions should automatically be reviewed for *Charter* concerns prior to their coming to Cabinet. The standard-form Cabinet submission document was changed so that it would be clearly indicated on the cover page whether or not there were any outstanding *Charter* concerns.⁴⁸

This heightened attention to the *Charter* created additional demands for *Charter* advice within the government. In 1987, the Ministry of the Attorney General created a new Constitutional Law and Policy Division under an Assistant Deputy Attorney General. The establishment of the division, with a staff of approximately twenty lawyers, allowed the Ontario Government to centralize constitutional and *Charter* policy decision making from a government-wide perspective. The mandate of the division was to provide a central "clearing house" for all *Charter* concerns, whether in relation to policy initiatives or litigation.⁴⁹

The government also provided for an expanded role for the Ministry of the Attorney General in the early stages of the policy development process. The government initiated a new policy whereby Attorney General staff would be given regular briefings on policy proposals which were being formulated in other ministries. This represented a departure from established practice. Historically, policy submissions were only shared with other ministries and ministers after

⁴⁶ *Ibid.*

⁴⁷ S.O. 1986, c. 64.

⁴⁸ Scott, *supra* note 45.

⁴⁹ Prior to that, legal advice was provided to government ministries largely by their own legal staff, on secondment from the Attorney General's Office, or by the Head Office of the Attorney General. The relationship of the Attorney General's legal staff to the individual ministries was primarily one of solicitor-client. In litigation matters, legal advice and services were geared toward winning cases. According to Ian Scott, *ibid.*, the result was an *ad hoc* response to *Charter* issues which hampered the development of a coherent and cohesive government *Charter* policy.

they had passed through a complicated bureaucratic and ministerial committee system and were ready to proceed to full Cabinet. Prior to the final stage in the process, the full Cabinet discussion, policy submissions were shared with other ministries and ministers only on a "need-to-know" basis. Under this established system, the Attorney General did not have systematic access to economic or social policy until very shortly before it reached the Cabinet table when, as a practical matter, it was too late to make significant changes.

Since 1986, however, the Attorney General's staff has had to be briefed on all developing issues, at least when they enter the formal policy approval process. This permits the Attorney General or a member of the staff to appear in Cabinet committees or bureaucratic committees of which the individual was not ordinarily a member and raise questions about possible *Charter* implications.⁵⁰

As in the federal government, the goal in Ontario is to address *Charter* issues as early in the policy process as possible. Usually, ministry policy staff consider the *Charter's* impact on their Cabinet proposals and consult lawyers in their own ministry on secondment from the Attorney General's office. Ontario has attempted to bring together lawyers and policy makers at the earliest possible stage in the hope of counteracting unproductive rivalries and misunderstandings about their perceived roles. Previously, there was a sense that some policy makers resented what they regarded as *interference* by Attorney General legal advisers. The lawyers were sometimes perceived as lacking knowledge of the policy concerns at stake. Early interaction is intended to further mutual understanding and to underscore the lawyers' role in protecting policy objectives from judicial attack on constitutional grounds.⁵¹

Today, before a matter can proceed to Cabinet, the responsible minister must certify that there are no outstanding *Charter* concerns. Any concerns which do arise are to be resolved through discussions with the ministry legal counsel and/or lawyers in the Constitutional Law and Policy Division of the Attorney General. If *Charter* concerns arise after a policy submission has entered the formal approval process, the Cabinet Office refers them back to the originating ministry and to the

⁵⁰ *Ibid.* at 5-7. Scott notes that the success of this process must depend on an assertive minister who is "prepared to minimize his political role."

⁵¹ *Ibid.* at 6 and at 7.

Constitutional Law and Policy Section. The Attorney General may also raise *Charter* concerns in Cabinet.

At the next stage, when the policy proposal has received Cabinet approval and is ready to be translated into legislation, the Legislative Council lawyers look at possible *Charter* risks for drafting purposes.⁵² Finally, the Legislation and Regulations Committees in the Legislative Assembly scrutinize the legislation for *Charter* conflicts prior to its being introduced in the House.

2. Substantive policy making

Ontario officials participating in this study were of the view that the *Charter* has played a very significant role in the policy process. Like the federal Department of Justice, the Ontario Attorney General's Department has become very much a central agency wielding significant influence within the policy process. But, Attorney General lawyers regard themselves as partners with officials in the line ministries, rather than as roadblocks standing in the way of policy proposals. They recognize that, when working with policy makers in the line ministries, they have to learn to understand the policy goals at issue in any proposal and to find means to further those goals without violating *Charter* principles.

At the Round-table Conference, the Executive Coordinator of the Cabinet committee on Justice from the Ontario Cabinet Office identified a number of major, but not exclusive, areas in which the *Charter* has had an impact on policy making:⁵³

1. Perhaps the most obvious impact comes when the government loses a *Charter* case and is required to implement major policy or administrative changes as soon as possible. For example, the Ontario Attorney General's Department had to respond to the *Askov*⁵⁴ decision quickly, by speeding up the trial process, altering its resource allocation priorities, changing the court

⁵² J. Jai, Executive Co-ordinator, Cabinet Committee on Justice, Cabinet Office, Ontario, Address (Oral remarks at the Round-table Conference, York University, November 1991) [unpublished].

⁵³ *Ibid.*

⁵⁴ *Supra* note 14.

system and the relationship between Crown and defence attorneys, and requiring earlier disclosure by them.

2. Even where the government wins a *Charter* case, the risk of loss usually acts as an incentive for it to rethink the issue and the consequences of defeat on a future challenge. For example, although the government successfully defended the *Retail Business Holidays Act*⁵⁵ on two separate occasions, the perceived vulnerability of the legislation to court challenge, coupled with other factors such as the economic weakness of the retail sector, caused the government to make amendments to the legislation.⁵⁶
3. The government may use the *Charter* to challenge the legislation of other governments. In a hypothetical example, the Ontario Attorney General could invoke the *Charter* to challenge the constitutionality of the federal abortion bill.⁵⁷ This strategy is not exclusive to the *Charter*, of course, and was used in the early 1970s when Manitoba challenged Quebec's restrictive marketing board practices by referring the Quebec scheme, thinly disguised, to the Manitoba Court of Appeal and on to the Supreme Court of Canada to test its validity.⁵⁸
4. The possibility of a *Charter* challenge is often the rationale for prioritizing government action in a particular area, bumping a matter that would otherwise simmer on the back burner to the top of the policy initiative list.

With respect to the impact of the *Charter* on the day-to-day development of policy, there tended to be some dichotomy between the views of Attorney General lawyers and those of officials in other ministries or agencies. While lawyers in the Ministry of the Attorney General view *Charter* concerns as being in the forefront of policy development, policy makers in central agencies like the Cabinet Office

⁵⁵ R.S.O. 1990, c. R.30.

⁵⁶ See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; and *R. v. Paul Madger Furs Ltd.* (1989), 69 O.R. (2d) 172, where the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, was successfully challenged following which the *Act* was amended: *An Act to amend the Retail Business Holidays Act*, S.O. 1989, c. 3.

⁵⁷ Bill C-220, *An Act to amend the Criminal Code (abortion)*, 3d Sess., 34th Parl., (1st reading 3 June 1991).

⁵⁸ *Manitoba (A.G.) v. Manitoba Egg and Poultry Association (The Manitoba Egg Reference)* (1971), 18 D.L.R. (3d) 326 (Man. C.A.), aff'd [1971] S.C.R. 689.

and the line ministries consider the *Charter* to be only one factor in the process. Further, while Attorney General lawyers tend to suggest that a broad interpretation be given to *Charter* requirements, line ministry officials often favour a narrower reading of the relevant *Charter* provision.

The *Charter* also appears to have had a significant impact on certain agencies, boards and commissions in the Ontario Public Service. One example of this impact is provided by the Ontario Human Rights Commission. Pursuant to the *Ontario Human Rights Code*,⁵⁹ the Commission is both an investigative and prosecutorial body. After investigating a complaint, the Commission decides whether to refer the matter to the Human Rights Tribunal before which the Commission will then prosecute the complaint.

In its investigative mode, the Commission is particularly concerned with procedural challenges on the issue of delay under section 7 of the *Charter* and restrictions upon its search and seizure powers pursuant to section 8.⁶⁰ In its prosecutorial mode, the Commission sees

⁵⁹ *Ontario Human Rights Code*, R.S.O. 1990, c. H-19 [hereinafter *Human Rights Code*].

⁶⁰ See R. Devins, Commissioner, Ontario Human Rights Commission, "A Perspective from the Ontario Human Rights Commission" (Paper prepared for the Round-table Conference, York University, November 1991) [unpublished]. See p. 499, note 1.

For example, in cases involving allegations of sexual harassment, the courts in Saskatchewan have held that unreasonable delay can deprive a respondent of the right to "life, liberty and security of the person" under section 7. The stigma that attaches to an individual accused of sexual harassment has clearly influenced the court. The Saskatchewan Commission has instituted a policy of priority-handling for sexual harassment cases to avoid further challenges on the ground of delay. Although there have not yet been any cases in Ontario in which a section 7 delay argument has been successfully raised, the Human Rights Commission is clearly mindful of this issue when it deliberates and, with the aid of government funding, has moved to eliminate its backlog and minimize delay.

The restrictions imposed by section 8 of the *Charter* on the obtaining of search warrants have also been of concern. Following *Southam*, *supra* note 36, any application for a search warrant must be specific and identify the documents being sought with a significant degree of particularity. This creates real difficulties for the Commission in investigating broad-based complaints of systemic discrimination, since there is not likely to be a single or even a series of incidents which can be proven upon production of predetermined documents. Rather, it is typical that a general pattern or practice is alleged to be discriminatory. Moreover, individual complainants are typically aware only of the facts pertaining to their own circumstances. Complaints of systemic discrimination require an investigator to go on site and analyze the records available in a wide-ranging fashion to determine the scope of systemic barriers. In the absence of an "inside" informant or witness who can direct the Commission to specific files or documents, the Commission feels that it will be almost impossible for the solicitors drafting the warrant application to compose sufficiently specific requests for documents. Unless the courts allow greater latitude in this area, the Commission's view

its work as particularly closely linked with the *Charter*. Many of the core values that underlie the *Human Rights Code* such as protection of individual rights and pursuit of equality, are similar to those that inform the *Charter*. The Commission interprets section 28 of the *Human Rights Code* as charging it to ensure that the *Code* is consistent with the *Charter*, in particular the equality provisions under section 15.⁶¹ Consequently, the Commission staff have reviewed the *Human Rights Code* and are in the process of preparing submissions, setting out their analysis of perceived infringements, to present to the responsible minister. The Commission has questioned the validity of parts of its own enabling legislation in the context of a complaint, even in the face of a defence by the Attorney General.⁶²

3. Litigation policy

The Ontario Government has moved to ensure that the positions advanced in particular *Charter* cases are consistent and reflect a coherent approach to the interpretation of the *Charter*. The Constitutional Law and Policy Division within the Ministry of the Attorney General is responsible for vetting the legal arguments advanced by the government in *Charter* cases. The government does not automatically defend all impugned legislation. For example, the government agreed in *Re Blainey and the Ontario Hockey Association*⁶³ that the exemption in the *Human Rights Code*, as it existed then, which permitted the exclusion of girls from minor league hockey was a violation of the *Charter*. However, concessions of this kind are relatively infrequent, and the far more

is that its ability to initiate and investigate complaints of industry-wide discriminatory practices will be impeded in cases where there is no complainant with sufficient details who is willing to come forward.

⁶¹ Section 28 of the *Human Rights Code* provides for the formation of a race relations division to perform functions relating to race, ancestry, place of origin, colour, ethnic origin, or creed that are referred to it by the Commission.

⁶² See Devins, *supra* note 60 at 5-8. At least on one occasion, the Commission has sent a case to the Board of Inquiry taking the position that certain sections of the *Code* are inconsistent with section 15 of the *Charter* and are not reasonable limits on that right under section 1.

⁶³ (1986), 54 O.R. (2d) 513 (C.A.). In this case, the *Human Rights Code*, S.O. 1981, c. 53, s. 19, was successfully challenged.

common practice is to attempt to defend legislation once it has been challenged.

In fact, the government will often prefer to wait for a court challenge before instituting a policy change in the case of a politically controversial issue. The government recently defended and lost a case involving election laws which prevented inmates from voting provincially.⁶⁴ Even though there was a prior awareness that this restriction may violate the *Charter*, the matter was not on the government's list of priorities. One may query, of course, why the restriction was defended at all under those circumstances.

4. Summary

The pattern in Ontario is similar in many respects to that observed in the federal government. The emphasis has been on putting in place new formalized structures or procedures to ensure that *Charter* issues are addressed as early in the policy process as possible. The premise of this approach is that most *Charter* concerns can be accommodated in a manner which still permits the government to achieve its policy objectives. Because all Cabinet submissions must be certified as being in compliance with the *Charter*, the Attorney General appears to have assumed the status of a central agency within the government as a whole.

C. Saskatchewan Government

1. Institutional change

The Government of Saskatchewan comprises a much smaller, more centralized bureaucracy than Ontario or the federal government.⁶⁵ All Crown lawyers work within the Department of Justice and are not formally attached to line ministries or departments. Within Justice,

⁶⁴ See Jai, *supra* note 52.

⁶⁵ G. Mitchell, Assistant Director of Constitutional Law, Department of Justice, Saskatchewan, Address (Oral remarks at the Round-table Conference, York University, November 1991) [unpublished]. See p. 499, note 1.

however, certain solicitors are responsible for providing legal advice and assistance to these ministries.

The sole adviser to the Saskatchewan Government on *Charter* issues is the Constitutional Branch of the Justice Department. It will, when requested, offer legal advice at all stages of the policy development and legislative drafting processes. The branch is also responsible for conducting and coordinating *Charter* litigation that involves the provincial government. This centralized role is thought to ensure consistent advice on *Charter* policy.⁶⁶

Perhaps as a consequence of the smaller, more centralized nature of the Saskatchewan bureaucracy, its process of *Charter* review is more *ad hoc* and informal than that in Ontario or Canada. In those larger governments, structures and specific procedures have been implemented to ensure, insofar as possible, that Justice plays a major role at the earliest stages of the process. In Saskatchewan, the onus appears to be on the line ministry to seek *Charter* advice; no bureaucratic structure or procedure is in place to require consultation in the same kind of systematic way.

The ministry lawyer may be asked to review what are, at a given stage, general policy proposals. Any *Charter* issues which the solicitor identifies will usually be referred to the Constitutional Branch for assessment and a legal opinion. The branch's involvement at this early point in the policy development process operates to educate both departmental officials about the *Charter* and the legal people about the societal, section 1 values at stake.

At the formal or drafting stage of legislation, *Charter* advice is requisite. Once a proposal for legislation is approved by Cabinet or the Legislative Review Committee, drafting instructions are prepared by the responsible department or agency. These instructions are then forwarded to the appropriate Crown solicitor for his or her consideration. Even if the drafting instructions are not referred to the Constitutional Branch at this point, the Legislative Drafting Section

⁶⁶ *Ibid.* at 3-4.

forwards all draft legislation to the branch before it is returned to the Legislative Review Committee for final approval.⁶⁷

2. Substantive policy making

According to the representative from the Constitutional Branch, proposed legislative initiatives are now measured against the *Charter* before they are finalized.⁶⁸ However, this type of approach, in which *Charter* concerns are not addressed until late in the policy development process, will make it more difficult to accommodate those concerns. The experience in both Ontario and the federal government indicates the importance of raising *Charter* issues at the earliest possible stage in the process. Precisely because Saskatchewan has not instituted such an early-warning system to regularly raise *Charter* issues, the *Charter's* impact on the policy development process may be more limited.

When legislation is actually found by a court to be of no force and effect, the Constitutional Branch of the Justice Department in Saskatchewan will work to find constitutionally acceptable alternatives to the invalidated legislative scheme with representatives from the relevant government ministries.⁶⁹ In rare cases, where the Saskatchewan Government determines that the importance of a legislative scheme from a social and/or economic policy perspective outweighs any and all constitutional considerations, it will invoke section 33 of the *Charter*.

⁶⁷ Mitchell, *ibid.*, claims that the legislative drafters and committee members are deferential to the branch's recommendations for amendment on constitutional grounds. Such recommendations for amendment are based on what the branch perceives as the broad or liberal approach taken by the Saskatchewan Court of Appeal in *Charter* matters.

⁶⁸ *Ibid.* at 2. The *Charter* has been responsible for several sweeping legislative amendments. Shortly after the proclamation of the *Charter*, the entire body of Saskatchewan legislation was reviewed at the direction of the Attorney General to identify laws which were inconsistent with the *Charter* on their face. This resulted in an omnibus bill legislating appropriate amendments, the *Canadian Charter of Rights and Freedoms Consequential Amendment Act*, S.S. 1984-85-86, c. 38. In other areas, efforts have been made to craft a standard search and seizure provision for general use in provincial administrative and regulatory schemes such as occupational health and safety, workers' compensation, and environmental standards: see *The Oil and Gas Conservation Amendment Act*, 1991, S.S. 1990-91, c. 39, s. 6. The Constitutional Branch has been assisting legislative drafters with this task, refining the provision as the section 8 jurisprudence has evolved.

⁶⁹ See *supra* note 60 at 7.

The Government of Saskatchewan exercised this *final* option in 1986 to end a walk-out by the Saskatchewan Government Employees' Union.⁷⁰

3. Litigation policy

Due to its much smaller scale government, all of the Saskatchewan Government's *Charter* litigation is undertaken or supervised by a relatively small group of lawyers in the Constitutional Branch. Thus, there has been no need for the creation of new committees or constitutional divisions, such as are found in Canada or Ontario, to review legal arguments in *Charter* cases.

The Constitutional Branch's general approach is to defend, if possible, the impugned statutes. The branch's view is that, as counsel for the government, it should not waive the application of a law just because of the possibility of a judicial ruling against it. As well, in its view, the Attorney General must represent the interests of society before the courts, just as the applicant represents the interests of the individual. Therefore, only in a case where there is no reasonably plausible argument in favour of legislation will the branch advise a governmental department to forego defending its policy in court and amend it to satisfy *Charter* requirements.

4. Summary

The pattern in Saskatchewan is quite different from that encountered at the federal level or, at the provincial level, in Ontario. Saskatchewan has not created any new formal procedures or structures in order to explicitly address *Charter* concerns. In large part, this appears to be the result of the smaller scale government in Saskatchewan. Saskatchewan takes the view that all legislation should be defended from *Charter* challenge. It considers it the Attorney General's responsibility to defend legislation from any constitutional challenge.

⁷⁰ See *The SEGU Dispute Settlement Act*, S.S. 1984-85-86, c. 111. Also see Mitchell, *supra* note 65 at 7.

D. British Columbia Government

1. Institutional change

The Ministry of the Attorney General of British Columbia is divided into a number of branches, including Criminal Justice and Legal Services, which in turn is subdivided into Solicitor, Barrister, and Legislative Counsel Divisions. The Ministry solicitors generally are responsible for providing day-to-day legal advice to their client ministries. Within the Barrister Division, there is a section which specializes in administrative and constitutional law.⁷¹

There is a newly redesigned legislative approval process in place whereby policy initiatives are examined for *Charter* problems. As with Saskatchewan, it is far less formal than in either Canada or Ontario.

When the House Leader issues a call for legislative proposals from the line ministries, the internal departments that consider policy, planning, and legislation coordinate and prioritize those requests. If the line ministry's solicitor is involved at the early stages of the request for legislation, the policy is reviewed for *Charter* problems at that time, although in ministries like Health there are no formal written guidelines for *Charter* issues to be considered at that point.⁷² After the requests for legislation have been considered, either by the Deputy Ministers' Committee, various Cabinet committees, Cabinet as a whole, or the Treasury Board, where funding approval is required; Cabinet sets the legislative priorities and the policy initiatives are sent to be drafted.⁷³ At that stage, a Cabinet Directive requires that *Charter* issues be considered. Once in the hands of the Legislative Counsel's office for

⁷¹ S. Gallagher, Solicitor, Ministry of the Attorney General for British Columbia, "Impact of the Charter on the Public Policy Process" (Paper prepared for the Round-table Conference, York University, November 1991) at 1 [unpublished]. See p. 499, note 1.

⁷² This is in contrast to the procedure in Ottawa where policy makers are required to seek legal advice early in the process, and in Ontario where legal counsel work with policy makers to develop policy as a matter of routine practice.

⁷³ In some ministries, like Health, the initial rough drafting and instructions for drafting are prepared by members of the Policy, Planning and Legislation Department together with legal counsel, who presumably will attempt to identify and resolve any *Charter* issues that arise. This department will then pass instructions to legislative counsel for final drafting and preparation of the bill.

drafting, the counsel assigned to the task flags any *Charter* issues and refers them to the Ministry of the Attorney General's Constitutional and Administrative Law Section.

The proposed legislation, now in bill form, is then sent to the Cabinet committee on legislation, where it is reviewed by a senior policy analyst in the Premier's office with a special eye to identifying *Charter* problems. The analyst may also refer any concerns back to the Ministry of the Attorney General and, in particular, request further opinions from the Constitutional and Administrative Law Section.⁷⁴

After all the prerequisites are met, the bill is taken to Cabinet for final approval. Once it is approved, the Minister briefs caucus before the bill is introduced into the Legislature.

Regulations and orders in council, which are often prepared within the sponsoring line ministry, are signed by a number of ministry officials, including legal counsel. The scrutiny afforded by these methods of policy implementation varies depending upon the underlying policy and sponsoring line ministry.⁷⁵

2. Litigation policy

In the face of a *Charter* challenge, the Justice Department and line ministries which review the matter, are reportedly amenable to making changes to take account of *Charter* concerns. This is more likely to be the case where the provision in question was enacted prior to the *Charter*, and therefore prior to the *Charter* scrutiny that routinely takes

⁷⁴ See Gallagher, *supra* note 71 at 3.

⁷⁵ In the Ministry of Health, for example, the level of scrutiny of orders in council and regulations is relatively high in accordance with an informal procedure that has developed internally. The Conference was advised that this scrutiny is required by the same Cabinet Directive that requires scrutiny of legislative enactments. Furthermore, section 2 of the *Regulations Regulation*, made under the *Regulations Act*, R.S.B.C. 1979, c. 361.1, as rep. by *Regulations Act*, R.S.B.C. 1983, c. 10, s. 18, requires that the regulation-making authority be advised whether the proposed regulation is authorized by the enactment under which it is made; is an unusual or unexpected use of that authority; trespasses unduly on existing rights and freedoms; is consistent with the *Charter*; and is drafted in accordance with the standards set by the Chief Legislative Counsel.

place today. New legislation that has been conceived and drafted with the *Charter* in mind is likely to be defended by the Attorney General.⁷⁶

3. Summary

The British Columbia approach more closely resembles the one in Saskatchewan than that in either Canada or Ontario. There is no formalized procedure or process to consider the *Charter* concerns at the initial stages of the policy process. *Charter* issues are required to be addressed only after a policy proposal has received Cabinet's initial approval and has reached the drafting stage. As noted earlier, there is less flexibility at this stage in the process, making it more difficult to modify policy proposals to respond to the *Charter*.

III. THE CHARTER AND PUBLIC POLICY: THE VIEW FROM OUTSIDE GOVERNMENT

It is evident that government officials believe themselves to be very responsive to *Charter* concerns. But to what extent is this perception shared by those outside of government, particularly individuals or interest groups who see the *Charter* as a central concern?

In an attempt to answer this question, this study included participation by representatives of interest groups, academics, and representatives of the private bar. As might be expected, these participants from outside government took a much less favourable view of government's response to the *Charter*. Significantly, however, the objections raised were by no means uniform or even consistent with each other. In certain cases, it was said that the government was not taking the *Charter* seriously enough and that it needed to take a broader view of

⁷⁶ If the attack is on the wording or interpretation of a regulation or policy, for example, the line ministry will be alerted as a matter of practice before the writ or petition is served. If the ministry solicitor advises that the wording or interpretation offends the *Charter*, the ministry will often make the necessary modifications. Where the attack is on the government's interpretation or application of a statutory provision, again the ministry, if forewarned, may simply modify its interpretation. If, however, the attack is on the provision itself and the Legislature is not in session, it will not be possible to change the impugned provision even if the government agrees that it is unconstitutional. In some cases, the action may be adjourned until the Legislature has had the opportunity to change the offending provision.

the nature of its *Charter* obligations. But in other instances, precisely the opposite objection was raised. In this second category of cases, it was argued that the government had taken an overly broad view of the *Charter* and that this inhibited it from proceeding with meritorious policy initiatives.

Consider, for example, the views expressed by a representative⁷⁷ of the Women's Legal Education and Action Fund.⁷⁸ Groups like LEAF see themselves as performing a dual role. First, they bring *Charter* challenges against government legislation or policies. In this context, they complain primarily that the government's decision to defend legislation or policies is largely automatic and not based on policy considerations or even the merits of the case. They see little evidence of the decision to defend being reconsidered, or this type of litigation being a trigger for policy review. They also complain that there is no sense of special governmental responsibility for fostering and promoting *Charter* rights. Rather, according to them, the government treats *Charter* litigation like any other, without any discernable attempt to spare the purses of special interest groups by voluntary disclosures, fewer discoveries, avoidance of procedural technicalities, or consolidation of issues. Private practitioners who participated at the Round-table Conference and who regularly litigate constitutional cases against the government, shared the view that the government uses the same tactics that it uses in any other litigation; it bankrupts the opposition before the case gets to trial.

But LEAF does not see the *Charter* simply as a means to challenge or restrict government action. LEAF, and other "equality-seeking groups" believe that government has been given a *Charter*-imposed responsibility to promote equality proactively.⁷⁹ This responsibility includes an

⁷⁷ See E. Shilton, "Charter Litigation and the Policy Processes of Government: A Public Interest Perspective" (Paper prepared for the Round-table Conference, York University, November 1991) also in this volume.

⁷⁸ Hereinafter LEAF.

⁷⁹ Groups like LEAF feel that, after *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*], and *R. v. Keegstra*, [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; there is a positive role for legislatures in the promotion of equality. In *Irwin Toy*, the Supreme Court of Canada said that it will take a more flexible approach in the balancing of rights and interests under section 1 of the *Charter*. It would do this where interests other than those of the state are being protected and promoted by the legislation under attack, and will, in particular, allow the government more scope to balance the claims of competing groups where the rights of vulnerable

obligation to defend "equality promoting" legislation when that legislation is challenged. They also believe that when such legislation is ruled unconstitutional, there is an obligation to draft new legislation which will advance equality goals.

In the view of LEAF and other equality-seeking groups, governments in Canada have failed to discharge adequately the positive obligations associated with the *Charter*.⁸⁰ The federal government in particular is criticized for being too timid in defending legislation under *Charter* attack. The government is also regarded as being too reluctant to bring forward new legislation to replace laws ruled unconstitutional by the courts.⁸¹

A somewhat different perspective was offered by a number of private lawyers who were not connected with these equality-seeking interest groups. The focus of the criticism from these private practitioners was that government litigation strategy is not well formulated. The decision to defend is viewed as a "knee-jerk" reaction to the institution of proceedings, or as a means to avoid spending the required monies, or to avoid finding a political solution to a

groups are at stake. The Court said in *Keegstra* that legislation designed to promote and enhance equality rights is entitled to special protection under section 1 in light of the *Charter's* commitment to equality and the reflection of that commitment in section 1. LEAF has interpreted these decisions to mean that there must, therefore, be a high premium placed on proper legislative drafting, creation of legislative history, which leaves no room for doubt about legislative intent to promote equality, and proper litigation strategies to defend the legislation against attack. LEAF's perception is that these have been missing. If government lawyers are, as suspected by LEAF, vetoing policies that run a *Charter* risk, LEAF would argue that the advice of outside counsel should be sought because, after cases like *R. v. Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*], some *Charter* risks should be taken.

⁸⁰ LEAF's perception is that the government has consistently shown a lack of sensitivity to equality values. Whatever section 1 evidence is marshalled in support of government policy, it includes very little that is tailored to support a possible section 15 argument. It has been largely up to LEAF, in LEAF's opinion, to make the section 15 case in, for example, *Irwin Toy*, *Keegstra*, and *Seaboyer*: *supra* note 79.

⁸¹ It should be noted that this perception is not necessarily universally shared by the "equality-seeking" movement. For example, the perception of those connected with the Disability Rights Movement, according to the Advocacy Resource Centre for the Handicapped (ARCH) representative at the Conference, is that the *Charter* has been useful in effecting social change. When the *Charter* was enacted, ARCH sought the inclusion of the handicapped as part of a strategy of law reform. Since then, the Disability Rights Movement has relied on litigation as a strategy over and above law reform. The disabled and the Aboriginal people have also found that *Charter* litigation is a successful tool for increasing public visibility and an awareness of their rights thereby increasing the pressure on government to respond to their needs. See A. Nikias, Advocacy Resource Centre for the Handicapped, Address (Oral remarks at the Round-table Conference, York University, November 1991) [unpublished].

controversial problem. This is so even where there is an obvious *Charter* infringement. One example cited pertains to religion in public schools. Even after the Ontario Court of Appeal had struck down the regulations of the Sudbury School Board providing for prayer in the public schools in *Zylberberg v. Director of Education of Sudbury Board of Education*,⁸² the government defended, with section 1 evidence, a similar type of regulation providing for religious education in Elgin County. The regulation was again struck down. Even then, however, the Minister of Education failed to provide directions on the matter to the Board of Trustees in Sault St. Marie who had elected to continue with Christian indoctrination in the schools. Only when faced with another *Charter* challenge did the trustees change their position.⁸³

In sum, those directly involved in dealings with government in relation to the *Charter* appear to be dissatisfied with the response they have received. However, the criticisms that are raised are inconsistent with each other. In some cases, the government is criticized for not taking the *Charter* seriously enough and for defending legislation which ought to be abandoned. In other cases, the government is criticized for conceding defeat too easily or for not defending legislation from *Charter* attack with sufficient vigour.

In our view, evidence suggests that the government has indeed been taking the *Charter* seriously and attempting to respond to its requirements. We do not suggest that any particular decision, either to defend or not to defend legislation, is correct. We merely observe that the government is clearly thinking hard about the *Charter* and making an effort in good faith to respond to it in an appropriate manner.

⁸² (1988), 52 D.L.R. (4th) 577 (Ont. C.A.).

⁸³ See L. Taman, former Assistant Deputy Attorney General for Constitutional Law and Policy for Ontario, "The Charter and Public Policy" (Paper presented at the Round-table Conference, York University, November 1991) [unpublished]. See p. 499, note 1. Mr. Taman, now a private practitioner, made a number of points in this regard. First, he noted that government lawyers do not have one client. They serve a multi-headed hydra with non-communicating heads, each one with very different policy interests at stake. This makes it difficult to reach a uniform policy position on any given case that would facilitate a settlement. In other cases, the government has simply been unable to come to terms with rights seekers on initiatives to amend or replace existing legislation. The result is that, in cases where the government has successfully defended the existing law, the proposed amendments drop off the government's priority list. Finally, litigation often proceeds because both sides want a judicial decision on an issue. Government may want to avoid the political heat that comes with a controversial decision by leaving the problem to the courts. Special interest groups often want a precedent-setting decision.

This conclusion was supported by the observations of a number of other participants in this study who are not directly involved in *Charter* litigation. Professor Morton theorized that *Charter* advocacy groups have succeeded in achieving significant political power, enabling them to influence a number of other players in the policy-making process. Morton sees the state itself as intertwined with equality-seeking groups. He uses the term "Court Party" to describe the coalition of *Charter*-based groups, due to the public funding provided for their operating budgets, the availability of courts, and human rights commissions as forums for the pursuit of their interests and the institution of bureaucratic processes for *Charter* review of policy.⁸⁴ Morton includes in the above list the public funding of universities alleging that they are the seat of constitutional activists who tend to sympathize with the policy agenda of equality-seeking groups.⁸⁵

In Morton's view, *Charter*-based groups have actively sought to advance their interests by circumventing the electoral-legislative process and working their agenda through the courts. In his view, they believe that federally appointed judges will provide a more sympathetic hearing than the elected representatives of the voting majority who are opposed to paying more taxes to finance social reform. Consequently, he sees constitutional litigation, for these groups, as another form of constitutional amendment.⁸⁶

Obviously, these varying perspectives from outside of government on the *Charter*'s role and impact are inconsistent and even contradictory with one another. But considered as a whole, they tend to confirm the perceptions that government officials have offered concerning how the *Charter* has affected public policy and law enforcement. Government officials reported that the *Charter* has had a significant impact on how governments go about their business in the 1990s, on the formulation of government policy, and on the administration of law. Whole new structures or procedures have been put in place in some governments to respond to *Charter* concerns. The

⁸⁴ F.L. Morton, "The Charter Revolution and the Court Party" (Paper prepared for the Round-table Conference, York University, November 1991) also in this volume at 627.

⁸⁵ Morton in his paper, *ibid.*, postulates that the *Charter* scholarship emanating from these institutions has contributed greatly to the revolution of the Supreme Court of Canada from pre-*Charter* restraint to post-*Charter* activism.

⁸⁶ *Ibid.*

views of those outside government tend to confirm the validity of these observations from those inside government. Even those who complain that governments are failing to take the *Charter* seriously enough object to the fact that, in certain cases, the government has been too timid in defending its legislation from *Charter* attack.

In our view, there can be little doubt that the *Charter* has transformed the nature of the policy process. The more difficult question, however, pertains to the precise nature of the *Charter's* impact on government law making and law enforcement. It is to this issue that we now turn.

IV. ANALYSIS AND CONCLUSIONS

We observed at the outset that it is difficult to offer any hard and fast generalizations about the *Charter's* impact on public policy and law enforcement. Despite this caveat, we believe it is possible to offer four general conclusions about how the *Charter* has affected the day-to-day workings of government in Canada.

A. *No Uniform Government Response to Charter Analysis*

The first conclusion to emerge from this study is hardly surprising, but bears repeating: different governments have responded in different ways to the *Charter's* enactment. Within certain governments, particularly Canada and Ontario, new procedures or bureaucratic structures have been created to deal explicitly with *Charter* issues. The goal of these new procedures is to attempt to raise *Charter* issues and concerns as early in the process as possible. There has also been an attempt in both the federal and Ontario governments to ensure a consistent, coherent approach to *Charter* issues government-wide.

Other governments have not yet instituted such formalized approaches to their *Charter* analyses. In both Saskatchewan and British Columbia, we noted that there is no procedure that guarantees that *Charter* issues are addressed at the policy formulation stage. Whether the *Charter* is raised as an issue at this early stage in the process depends on the particular individuals or ministries involved.

One expects the *Charter* to have its greatest impact on policy making in governments that have instituted more rigorous and formalized procedures for *Charter* review. This is because these types of formal procedures will bring a greater number of *Charter* issues to the attention of policy makers. They will also provide a more complete record and analysis of the relevant *Charter* concerns relating to a particular policy proposal.

While this hypothesis is intuitively appealing, how one might go about testing its validity in a systematic fashion is not self-evident. One possibility would be to compare the results in *Charter* cases involving different provinces with those provinces' approach to *Charter* analysis. Earlier studies have already pointed out wide variations in the results of *Charter* cases involving different provinces. But these variations may have more to do with the attitudes of the judges who sit on the different Courts of Appeal. As a result of an activist Court of Appeal, the Crown in Saskatchewan has tended to have a lower success rate in *Charter* appeals than the Crowns in other provinces.⁸⁷

We believe that this subject represents an important area for future research. One hypothesis is that the *Charter* will have its greatest impact within governments that have instituted formalized "early-warning" systems for *Charter* issues. But our data on the response of different governments to the *Charter* are incomplete. What is needed is more complete information on the ways in which governments have changed their policy processes in order to deal with the *Charter*. With this type of data, it will be possible to test our hypothesis in a more systematic fashion.

B. *Charter Narrows Discretion*

A major focus of debate at the time of the *Charter*'s enactment related to the *legitimacy* of judicial review. Critics of an entrenched *Charter* argued that it was inappropriate for unelected judges to substitute their views for those of elected political leaders.

⁸⁷ For example, Morton, Russell & Withey, *supra* note 7, point out that the Crown has won 83% of the 168 reported *Charter* decisions in the B.C. Court of Appeal; 73% of the 223 reported decisions in the Ontario Court of Appeal; and only 63% of the 85 decisions in the Saskatchewan Court of Appeal. The average for all Courts of Appeal is a 76% success rate for the Crown.

This study provides a new and different perspective on this continuing legitimacy debate. The consensus view amongst government policy makers is that the *Charter* does not operate as a *veto* on government initiatives or proposals. Rather, the officials participating in this study reported that the *Charter* adds a new variable to the *policy mix*. This new policy variable is the risk that the courts will intervene and rule that a particular initiative violates the *Charter*. But the introduction of this new policy variable does not appear to prevent the government from advancing its policy initiatives. It simply alters the calculations the government must make in drafting its legislation.

To be sure, the *Charter* does represent an important new variable in the policy process. Governments have made important changes to the way in which legislation proceeds through the Cabinet process to ensure that *Charter* considerations are highlighted and properly analyzed. This response has been motivated as much by necessity as by virtue. When a court strikes down legislation, the government is forced to respond, with very little notice, in an *ad hoc* fashion. A policy response may well be required within hours of the court ruling. It is clear that governments wish to avoid being placed in this type of reactive mode. For this reason, they will attempt to reduce the risks of an adverse *Charter* ruling by redrafting their legislation in advance so that it will be better able to withstand *Charter* scrutiny.

The risk of an adverse *Charter* ruling is not the only factor which the government will take into account when framing its legislation. The *Charter* is merely one in a wide range of variables, which a government will take into account in deciding how to frame legislation. In this sense, the *Charter* has not removed decisions from the hands of legislators and government officials and handed these decisions over to judges. Rather, it has altered the environment in which government decisions must be made.

Moreover, the assessment as to whether a particular government measure violates the *Charter* (and, therefore, must be redrafted) is as much a political analysis as it is a legal one. As an illustration, consider the different government responses reflected in two recent pieces of legislation—*Bill C-49*, the sexual assault amendments, and *Bill C-81*, the referendum legislation. In both instances, arguments were raised as to possible *Charter* violations. What is striking is that in one case *Charter* considerations were given precedence, while in the other they were discounted. Part of the explanation for the different government

responses in these two cases is, no doubt, linked to the particular *Charter* arguments that were raised. But in our view, the different approaches taken towards the *Charter* in these instances are as much a product of larger political considerations as they are of technical legal arguments. In this sense, the *Charter* can be seen as introducing a new political variable into the hands of politicians and bureaucrats, which can be used to advance political goals.

The first reading version of *Bill C-49* provides that an accused must take "all reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."⁸⁸ It thus proposes to alter the defences available to an accused charged with sexual assault. This provision will make it possible to convict an accused of sexual assault in circumstances where an accused person honestly, but mistakenly, believes that the complainant consented. Critics of the legislation have argued that this attempt to import a "reasonableness" standard into the definition of the offence raises a *Charter* issue.⁸⁹ But the government evidently came to the conclusion, at the first reading stage, that the risk was not so significant as to preclude this approach.

Contrast this with the government's approach to the *Charter* in *Bill C-81*. Here, the government argued that it was constitutionally precluded from imposing spending limits in a national referendum campaign. The main obstacle to spending limits appeared to be the guarantees of free speech and free association in section 2 of the *Charter*. According to the government, these *Charter* rights made it impossible to require that a referendum be fought between a single "Yes" committee and a single "No" committee. The inability to provide for two umbrella committees made the imposition of spending limits impracticable.⁹⁰

⁸⁸ See section 273.2(b) of *Bill C-49*, *supra* note 18.

⁸⁹ See G. York, "Lawyers wary of proposed rape law: Commons committee told new standards are contrary to centuries of accepted behaviour" *The [Toronto] Globe and Mail* (15 May 1992) A6. But note the amendments introduced by the government at the committee stage on 2 June 1992 were designed to reduce the risk of a *Charter* challenge. In particular, the government proposed to delete the word "all" in section 273.2(b), *supra* note 18, requiring the accused to take only "reasonable" steps to ascertain that the complainant was consenting.

⁹⁰ See G. Fraser, "Fear of Court case prompts looser law" *The [Toronto] Globe and Mail* (16 May 1992) A5. Note that the government introduced amendments on second reading limiting referendum expenditures, but without limiting the number of campaign committees. As such, the

In both cases, serious *Charter* arguments were at issue. In the case of *Bill C-81*, the *Charter* arguments were taken as decisive, at least on the issue of spending limits. In *Bill C-49*, on the other hand, the *Charter* concerns were seen as being less significant than the interest in protecting complainants in cases of sexual assault. What do these examples tell us about the way in which the *Charter* is likely to influence the policy process?

The first point to note is that whether *Charter* arguments are accepted or not depends to some extent on who is arguing in their favour. *Bill C-49* was drafted through what the government terms a "democratic, consultative process"⁹¹ in which government officials met with representatives of various interest groups. Representatives of these interest groups argued that the government was under an obligation to bring forward some kind of protection for sexual assault complainants in the wake of the *Seaboyer*⁹² case. Having agreed to this consultative process, it would have been very difficult for the government to back away subsequently and refuse to introduce some kind of new protection for complainants and victims, even though there were some *Charter* risks involved. The preamble to *Bill C-49* reflects this approach, noting that "the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse."⁹³ However, once the legislation was introduced, there was widespread criticism of certain provisions in it by the Canadian Bar Association and other legal groups. In the face of this sustained criticism, the government's legal opinion apparently

amendments do not constitute any real limit on overall expenditures by any particular group or interest.

⁹¹ See The Honourable Kim Campbell, "Notes for An Address on the Canadian Charter of Rights and Freedoms" (Address at the Conference on the Charter of Rights: Ten Years After, Simon Fraser University, 15 May 1992) at 21. According to media reports, the Bill was drafted after the Justice Minister held a series of meetings with a coalition of women's groups. See "Lawyers win concessions from Ottawa on rape bill" *The Toronto Star* (3 June 1992) A3.

⁹² *Supra* note 79. In this case a blanket exclusion of a complainant's prior sexual history under section 276 of the Criminal Code was ruled unconstitutional by the Court as violating the accused's rights under sections 7 and 11(d) of the *Charter*.

⁹³ See *Bill C-49*, *supra* note 18. This philosophy is reflected in the substantive terms of the Bill, which provides that courts shall consider "society's interest in encouraging the reporting of sexual assault offenses" in determining whether to allow evidence of a complainant's previous sexual history. See proposed section 276(3)(b).

changed with the Minister agreeing to a number of changes designed to strengthen protections for the accused.⁹⁴

In the case of the *Bill C-81*, no powerful political constituency argued in favour of spending limits. The most vocal proponents of referendum spending limits are Quebec sovereignists, who argue that spending limits are necessary to prevent the better-financed federalist side from simply drowning out the voices in favour of Quebec sovereignty. But because Quebec sovereignists have no political voice outside of the province of Quebec, there was no major political price associated with omitting these spending limits. It is surely no coincidence that in the case of *Bill C-81*, the *Charter* arguments based on free speech and free association proved decisive.

A second important consideration in the case of the referendum legislation was the very tight time frame facing the government. With the province of Quebec scheduled to hold a referendum by 26 October 1992, the Government of Canada wanted to be in a position to hold a national referendum on short notice prior to that date. Had the government introduced spending limits into the legislation, it would almost certainly have provoked a *Charter* challenge. This litigation might not have been finally resolved prior to the October deadline. Indeed, the only way the government could have obtained a definitive court ruling in a timely fashion would have been to refer the matter directly to the Supreme Court of Canada for an expedited hearing. But referring the issue directly to the Supreme Court would have had important drawbacks. Regardless of the outcome, the government would have been forced to postpone any referendum until after the Court had spoken. This would have significantly narrowed the window of opportunity for a national referendum and might have foreclosed the possibility of a national vote prior to 26 October 1992.⁹⁵ What this illustrates is that it is often the fear of *Charter* litigation itself, rather than outcome of the litigation, which pushes the government in a particular direction.

Thus, the government's decision to defer to *Charter* considerations in one case but not in the other was only partly due to the

⁹⁴ See C. Gaz. 1992.III.991. for the latest version of *Bill C-49*.

⁹⁵ Note that under the legislation the referendum campaign must last at least 36 days. This would mean that any *Charter* litigation had to be finally resolved by 19 September 1992 in order for a referendum to be held by 26 October 1992.

legal merits of the arguments raised. Other political factors also played a decisive role in the eventual decision of whether to frame the legislation so as to minimize the risk of an adverse court ruling.

The upshot of this analysis is that the *Charter* has not substituted judges for politicians, as some critics of the *Charter* feared would happen. Thus, many of the early concerns regarding the legitimacy of judicial review under the *Charter* may well have been overblown. It is evident that politicians and bureaucrats remain the primary political decision makers, even in the *Charter* era. Further, while the executive must take the *Charter* into account in its decisions, constitutional considerations rarely operate as legal handcuffs; there is still a large element of discretion and policy choice that remains in the hands of the government. Ultimately, the decision to defer to a *Charter* argument and redraft legislation is not simply a technical legal matter. It depends on a wide variety of extra-legal considerations, including such matters as the political support for, and timing of, the initiative.

In this sense, the *Charter* has changed the way government operates, providing new opportunities, advantages, and costs that must be taken into account in the policy process. But, it has not produced government by judiciary or relocated the locus of political decision making in Canada.

C. *Charter and Balance of Power Within Government*

A clear effect of the *Charter*'s enactment has been an increase in the status, visibility, and political power of lawyers and legal values within government. As the participants in our study emphasized, the Minister of Justice/Attorney General has acquired a new status and importance in the *Charter* era. Increasingly, the Attorney General is coming to be regarded as a central agency of the government, with a range of influence rivalling that of the Minister of Finance. This is particularly the case in the governments of Canada and Ontario, where all policy proposals are regularly scrutinized by Justice lawyers at the earliest stages of the policy process to ensure conformity with *Charter* values.

There are two reasons why this kind of *Charter* scrutiny is likely to increase dramatically the political power of lawyers within government. The first has to do with the high degree of indeterminacy

associated with any assessment of the likely impact of the *Charter* on a policy proposal. *Charter* jurisprudence is still in its infancy and the Supreme Court of Canada has only begun to sketch in very broad terms its approach to *Charter* analysis. In many policy areas, there may not even be any jurisprudence from that Court directly on point. Thus, the assessment of whether or not a particular policy proposal violates the *Charter* may often involve a very large element of guesswork.

Both of the examples, referred to earlier, illustrate the high degree of indeterminacy involved in assessing a possible *Charter* violation. In the case of *Bill C-81*, the only Canadian case law dealing with the constitutionality of spending limits under the *Charter* is a 1984 decision from the trial division of the Alberta Supreme Court.⁹⁶ Despite the sparseness of the case law, federal officials declared in definitive terms that spending limits in a referendum campaign would violate the *Charter*.⁹⁷ With respect to the sexual assault amendments, the government initially took the position that the proposals did not violate the *Charter*. Subsequently, the government reversed its course and introduced amendments designed to protect *Charter* rights.

Second, due to the indeterminacy associated with assessing the risk of a *Charter* violation, it will be very difficult for government lawyers to avoid colouring their legal analysis with their views of the substantive merits of legislation. This difficulty is compounded by the fact that the Attorney General is the sole official source of legal analysis within government. Ministers of the Crown are not permitted to seek opinions from outside government on the constitutional merits of a policy proposal that is working its way through the Cabinet system. The Attorney General has a monopoly on the provision of legal opinions within the government. Thus the degree of indeterminacy and subjective evaluation associated with any particular legal opinion may not be highlighted until after the key policy choices have been made. Politicians with no legal training will not be in a position to question effectively the *Charter* advice they receive from the Attorney General.

The combined effect of these various factors is to increase in quite a dramatic fashion the role, status, and power of the Attorney General and its officials. Cast in the role of a central agency, the Attorney General has the ability and the resources to affect the shape of

⁹⁶ *National Citizens Coalition Inc. v. Canada (A.G.)*, [1984] 5 W.W.R. 436 (Alta Q.B.).

⁹⁷ See statements made by Government House Leader Harvie André in Fraser, *supra* note 90.

policy proposals from all branches of the government. The indeterminacy of the legal judgments that must be made, combined with the legal monopoly enjoyed by the Attorney General's advisers, suggest that there has been an important shift in the balance of power within government.

D. *Charter and the Policy Environment Within Government*

The primary focus of this study has been on the internal workings of the policy process within different governments in Canada. But it is clear that this focus on the internal operations of government provides an incomplete picture of the *Charter's* impact on public policy. As was suggested in the previous paragraphs, the *Charter's* impact has been as much political as legal. The *Charter* has altered the political environment within which governments operate.

This change in the political environment is, of course, linked to *Charter* litigation and to the legal consequences that flow from a declaration that a particular law or policy violates the *Charter*. The *Charter* has also introduced a new kind of valuable political good or commodity into political argument and debate. This new political commodity is the ability to make a credible claim that some right, privilege, or other entitlement is protected by the *Charter*.

The most authoritative way to establish a credible claim of this kind is through a court declaration. But it is important to recognize that a credible claim that some right, privilege, or entitlement is protected by the *Charter* does not necessarily depend upon a court order. A court ruling, while authoritative, is expensive. Further, many issues may never reach the courts for resolution. In any event, *Charter* claims are made for purely political, as well as legal, objectives. They are advanced in political forums as well as courts, with the objective of shaping public policy in one's favour. Success in the political arena is far less expensive and time consuming since it makes court action to vindicate one's interest unnecessary.

Of course, the simple act of claiming that one's interest is protected by the *Charter* is not sufficient; one must be able to invoke some credible source or authority in support of one's claim. There are a variety of ways in which this credibility can be established. Perhaps one of the most important means is by an organization, which has received

some sort of official sanction or recognition supporting the claim. Organizations that fall into this category include Human Rights Commissions and organizations, independent Law Reform Commissions, university-based organizations, judicial bodies, and the associations of the organized bar. The Court Challenges Program, cancelled in the 1992 federal budget, also provided a form of official sanction and recognition. Indeed, the credibility and recognition the program conferred on funding recipients may well have been as important as the funding itself.

A full discussion of the way in which the *Charter* has affected the political process as a whole is beyond the scope of this study. Nevertheless, we offer here a few general and preliminary observations on this important issue. First, claims about the *Charter* are inherently technical arguments. Even when advanced in a political forum, they require legal expertise and authority. This, in turn, suggests that it will be organized interests, which have the resources to retain this legal expertise, that stand to gain a comparative political advantage from the *Charter's* existence. Established interests, such as governments, large corporations, and trade unions are obviously well positioned to take advantage of this opportunity and have done so in the first decade of the *Charter*. But the enactment of the *Charter* has been the catalyst for the creation of a whole series of new organizations, most of them linked in some way with the enumerated grounds in section 15 of the *Charter*. As the paper prepared by Professor Morton indicates, these "equality-seeking groups" have been very successful in linking their interests to the *Charter*.⁹⁸

A second observation is that the ability to link one's own interests with the *Charter* is an extremely valuable political commodity. It produces political results. In the case of *Bill C-49*, for example, lobbying by various legal organizations, such as the Canadian Bar Association, succeeded in persuading the government to amend the legislation so as to provide greater protection for the accused.⁹⁹ Because of the political potency of *Charter* arguments, there is a tremendous incentive to try to shape perceptions of the *Charter's* meaning so as to advance one's political goals.

⁹⁸ Morton, *supra* note 84.

⁹⁹ See "Lawyers win concessions from Ottawa on rape bill," *supra* note 91.

This political struggle over the meaning of the *Charter* is ongoing and ceaseless. But thus far, "minority groups," as well as persons accused of crimes, have come to be linked in the public mind with the *Charter*.¹⁰⁰ It is possible that there is a double-edged quality to this perception. On the one hand, having one's interests tied to the *Charter* can provide positive political results. At the same time, the drawback is that the public will come to regard the *Charter* as somehow linked to particular interests, rather than those of the community as a whole.¹⁰¹ As the *Charter* enters its second decade, these political dimensions of the *Charter* debate will prove as interesting and important as the pronouncements of the Supreme Court of Canada on the legal meaning of the document.

¹⁰⁰ See *supra* note 5 at 12 (Table 4), which found that "minority groups" and persons accused of crimes are seen by the public as being the greatest beneficiaries of the *Charter*. No definition was offered of the term "minority groups," but 66% of respondents believed that the *Charter* had had a positive impact on these groups, while only 13% believed that there had been a negative impact. An additional 13% believed that the *Charter* had had no impact on minority groups. This compared to 40% who believed that "Canadians like you" had benefitted from the *Charter*, with 39% indicating that the *Charter* had had no impact on them and 15% perceiving a negative impact.

¹⁰¹ Note that in April 1992, those Canadians who believed that the *Charter* had been a good thing outnumbered those who saw it as a bad thing by a 3 to 1 margin. *Supra* note 5.

APPENDIX A:
GUIDELINES FOR PREPARATION OF SHORT PAPERS

I. GENERAL

1. In your experience, has the *Charter* had a significant impact on the policy process of government? What has been the nature of that impact?
2. Has the *Charter* operated as a significant constraint on legislative supremacy? Has the existence of the *Charter* foreclosed certain sorts of policy options or made those options significantly more costly or difficult to pursue?
3. Has the *Charter's* impact been more significant in particular policy fields than others? Which policy fields have been more significantly impacted? Are there identifiable reasons for this differential impact?
4. It has been argued that the *Charter* was intended to have a *nationalising* impact as the differences between individual provincial legislation would be reduced or minimised. In your experience, has this been a consequence of the *Charter*?

II. PROCESS

1. Is there a standard procedure within the normal policy process which requires that *Charter* issues be considered? To what extent are *Charter*-related issues a regular feature of the policy process within your government?
2. In your experience, is it common for proposed legislation to be amended as a result of *Charter*-related considerations?
3. Once it has been determined that a particular piece of legislation raises *Charter* issues, how is the matter dealt with and resolved? In particular:
 - a) Are there any procedures that have been established that set out a method for resolving *Charter* issues?
 - b) What is the role of the Attorney General/Minister of Justice in relation to the line Ministry?

- c) At what stage in the policy process is the matter referred to Justice for constitutional advice?
- d) Whose advice and opinion is taken as conclusive?

III. CHARTER POLICY

1. Does the government tend to apply judicial decisions in a broad fashion at the policy-making stage or do policy makers apply them narrowly until the policy is actually tested in court?
2. How are costs or other policy considerations balanced against *Charter* rights? Is it generally accepted that policies should be framed in a manner that is least intrusive of individual rights?

IV. CHARTER LITIGATION

1. When a statute is challenged, is it automatically defended or are there circumstances where the government is prepared to concede the invalidity of the statute? In what circumstances and in what manner might this occur?
2. In the event that a statute is ruled unconstitutional, to what extent will the government seek to maintain the policy goal of the invalid legislation, through the use of some alternative mechanism or policy instrument?